UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/691
21 July 1995

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 691

Case No. 778: ITTAH

Against: The Secretary General of the International Civil Aviation Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman; President; Mr. Mikuin Leliel Balanda; Mr. Mayer Gabay;

Whereas, on 15 December 1993, Haim Ittah, a staff member of the International Civil Aviation Organization, hereinafter referred to as ICAO, filed an application requesting the Tribunal:

"...

11. On the merits, ...

(a) To find that the rejection by the Secretary General of ICAO of the recommendation of the ICAO Advisory Joint Appeals Board that the delay in filing an appeal be waived was unreasonable...;

(b) To find that the refusal of the Secretary General to agree that the appeal be submitted directly to the United Nations Administrative Tribunal was a denial of the Applicant's right to recourse;

(c) To order the hearing of the formally presented appeal by the Advisory Joint Appeals Board...; or,

(d) ..., to decide that the appeal refused by the Secretary General of ICAO shall be receivable before the Tribunal."

Whereas the Respondent filed his answer on 30 June 1994;

Whereas the Applicant filed written observations on 19 August 1994;

Whereas, on 25 May 1995, the President of the Tribunal, pursuant to article 10 of the Rules of the Tribunal, put questions to the Respondent, to which he provided answers on 31 May 1995;

Whereas, on 30 June 1995, the Applicant commented on the Respondent's submission;

Whereas, on 6 July 1995, the President of the Tribunal ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of ICAO on 21 September 1965, on a temporary appointment, and served thereafter on a series of fixed-term appointments until 10 March 1969, when he resigned from the Organization. The Applicant re-entered the service of ICAO on 1 November 1971, as a Draughtsman in the Central Typing Unit, Bureau of Administration and Services, on a temporary appointment, at the G-3 level. He served on a series of further appointments in different posts and on 20 May 1975, his appointment became permanent. During the course of his employment, he received successive promotions.

On 16 June 1979, the Applicant was appointed Technical Assistant in the Aeronautical Information Unit, Aeronautical Information and Charts Section (AIS/MAP). The post was at the G-8 level and the Applicant received a promotion to that grade.

With effect from 2 April 1986, the Applicant was temporarily assigned, at the P-2 level, to the AIS/MAP Section. He was paid a special post allowance (SPA) at that level, with effect from 2 July 1986, as he had "been carrying out many of the responsibilities of the [P-3 Supervisor, Information Services post] since ... 2 April 1986, in addition to fulfilling the functions of his own post". With effect from 1 May 1987, the Applicant was paid the SPA at the P-3 level, until 26 May 1991, when he reverted to the G-8 level.

In October 1986, the Applicant applied for three professional posts, noting that he was "the acting incumbent of the post of Supervisor, Information Services (AIS) [P-3] since 2 April 1986." In a letter dated 10 April 1987, the Chief, Recruitment and Placement Section, informed the Applicant that it had been decided to defer filling the post for some time on account of the implementation of certain economic measures. He added: "As soon as a decision is taken to resume the process of filling the post, we will contact you in order to ensure that you would still be available as an interested candidate."

On 28 February 1989, the Chief, Recruitment and Placement Section, informed the Applicant that the Administration was in the process of reactivating recruitment for the post he was encumbering and had decided to readvertise it. A new vacancy notice would be issued and the Applicant was asked whether he wished to be listed as a candidate for the post. In a memorandum dated 13 October 1989, to the Chief, Recruitment and Placement Section, the Applicant applied for the post describing the experience he had acquired as the "acting incumbent" of the post since 2 April 1986. He stated in that memorandum: "For the record, I wish to state that I am a citizen of Morocco." On 27 October 1989, the Chief, Recruitment and Placement Section, informed the Applicant that his application would be considered and asked him to ensure that "... a complete and up-to-date application form is available to REC [Recruitment] for presentation to the Board. Please do not refer to application forms or information submitted for other posts." According to the record, the Applicant did not submit a new application. On 25 March 1991, the Chief, Recruitment and Placement Section, informed the Applicant that he had not been selected for the post.

On 3 May 1991, the Applicant met with the Secretary General. On the same date, he wrote to him, recalling that he had fulfilled the duties of the post over the previous five years and requesting an explanation for his non-appointment to the post. In a reply dated 17 May 1991, the Secretary General informed the Applicant as follows:

> "Please refer to your memorandum of 3 May 1991 on the above subject. I can assure you that your candidature for the post in question has been given very thorough consideration by the Appointments and Promotion Board and myself. After having taken all relevant factors into account, based on the criteria provided for by staff regulation 4.1, I decided to appoint another candidate to this post."

On 21 May 1991, the Applicant requested the Secretary General to review that administrative decision. In a further memorandum dated 22 May 1991, the Applicant asked the Secretary General for a retroactive temporary promotion to the P-3 level, to enhance his pension rights. On 18 June 1991, the Chief, Personnel Branch, wrote to the Applicant, on behalf of the Secretary General, reiterating that his candidature for the post had been considered by the Appointment and Promotion Board, but that the Secretary General had decided to appoint another candidate. He also rejected the Applicant's request for a retroactive promotion. In the meanwhile, the Applicant suffered ill health and was on sick leave from 29 May until 19 August 1991.

On 31 July 1991, while the Applicant was on sick leave, the Secretary General's term of office expired. When the Applicant resumed his duties in August 1991, he asked for an interview with the successor Secretary General to discuss his employment and reiterate his request for an explanation for his non-appointment to the post. According to the Applicant, the new Secretary General promised to look into the matter, and some two weeks later informed the Applicant, by message, that he would postpone consideration of the matter until the question of the Applicant's nationality had been resolved.

On 15 April 1992, the Applicant wrote to the Secretary General, asking for a written response to his request of 21 May 1991, to review the administrative decision not to appoint him to the post. He recalled the alleged statement by the Secretary General that he would postpone consideration of the matter, pending resolution of the question concerning the Applicant's nationality.

On 13 May 1992, the Applicant lodged an appeal with the Advisory Joint Appeals Board (AJAB). In a memorandum dated 17 May 1993, the Chairman of the AJAB communicated to the Secretary General its recommendation as follows:

> "... the Board carefully reviewed all the relevant facts and circumstances associated with the filing of the appeal, including the fact that [the Applicant] had been on sick leave from 29 May 1991 to 19 August 1991, and that there had been continuing discussions with you on this subject. Taking into account also that the timing of the appeal is not in itself relevant to the substance of the case, the Board unanimously recommends that you exercise your discretionary power and waive the time limit prescribed in [ICAO] staff rule 111.1.6."

On 11 June 1993, the Chairman of the AJAB informed the Applicant as follows:

> "...
>
> I regret to inform you that I was advised by memorandum dated 10 June 1993 from the Secretary General that he did not 'recognize any exceptional circumstances in this case and [does] not agree to waive the delay.' Consequently, the Advisory Joint Appeals Board does not have the competence to hear this case."

On 15 December 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The delay in filing the appeal was due to the Applicant's understanding that the Secretary General would not consider the Applicant's request for administrative review until questions concerning his nationality had been resolved.

2. The refusal by the Secretary General to waive the time limit was arbitrary and unjust in that he did not advance any argument to the AJAB to justify his refusal to accept the AJAB's recommendation.

Whereas the Respondent's principal contentions are:

1. The Applicant was cognizant of all relevant ICAO regulations when he elected to delay his appeal before the AJAB.

2. The decision not to waive the time-limit referred to in ICAO staff rule 111.1.6 did not constitute an abuse of power.

The Tribunal, having deliberated from 6 to 21 July 1995, now pronounces the following judgement:

I. On 25 March 1991, the Applicant was notified that he had been unsuccessful in his candidacy for appointment to the P-3 post he had filled temporarily for a lengthy period. On 3 May 1991, he discussed this with the Secretary General and on the same date, he wrote to the Secretary General asking for an explanation as to why he had not been appointed to the post. By an inter-office memorandum dated 17 May 1991, the Secretary General responded, informing the Applicant that his candidature had been given thorough consideration by the Appointment and Promotion Board and by himself. After considering all relevant factors, he had decided to appoint another candidate.

II. The Applicant obviously understood this to be a formal decision since, by a letter to the Secretary General dated 21 May 1991, he asked him to review it. This is the procedure called for by staff rule 111.5. If the staff member receives no reply to his or her request for review within two weeks, from the date of receipt by the Secretary General of the request for review, he or she must submit an appeal within the two following weeks. Staff rule 111.6 provides that, if the staff member receives a reply and wishes to appeal a decision by the Secretary General, his or her appeal must be submitted to the AJAB within two weeks from the date of its receipt. Staff rule 111.7 provides that a staff member who fails to observe these time limits "shall lose the right to appeal, unless the delay is waived ..." by the Secretary General.

III. The Applicant takes the position that the Secretary General did not respond to the request for review dated 21 May 1991, but responded only to another request sent by the Applicant the day after the request for review, i.e., 22 May 1991. In the latter request, the Applicant -- also in the form of an inter-office memorandum -- asked for reconsideration of an earlier request for a temporary promotion to the P-3 level, with effect from 2 April 1987, under ICAO staff rule 103.18. By inter-office memorandum dated 18 June 1991, the Applicant received a reply to his inter-office memorandum to the Secretary General dated 22 May 1991.

IV. This latter reply, though directed to the memorandum of 22 May 1991, is also susceptible of being read as a reiteration of the rejection of the Applicant's candidature for the post previously referred to, as well as a refusal to promote the Applicant temporarily to the P-3 level. Be that as it may, the Applicant took no further action with respect to his request for a temporary promotion and, until 13 May 1992, did not seek to appeal further with regard to the appointment of an external candidate, rather than himself, to the post referred to in the 17 May 1991 communication from the Secretary General. The Tribunal notes that the Applicant was on sick leave from shortly after 22 May 1991 until 19 August 1991. In short, the Applicant made no submission to the AJAB until long after the expiration of the time limit.

V. The Applicant subsequently asked that the AJAB recommend to the Secretary General that, under the circumstances, the time limit be waived. The AJAB so recommended but a new Secretary General, the successor to the Secretary General who had written the letter dated 17 May 1991, declined to accept the AJAB recommendation. The Applicant appeals from that decision to the Tribunal.

VI. As the Tribunal has previously held, when the Respondent decides whether or not to waive the time-bar with respect to an appeal, "... he exercises discretionary power within the limits set

by the case law of the Tribunal - errors of fact or law, partiality, arbitrariness and discrimination. It is for the Applicant to show that ... refusal to waive the time-bar is tainted by one of these defects." (Cf. Judgement No. 527, Han, paragraph XIV (1991)).

VII. The Applicant bases his case on two arguments. First, he asserts that the delay in filing his appeal stemmed from his understanding that the successor Secretary General was not going to consider the Applicant's request for review until the question of his nationality had been resolved. The Secretary General denied having so indicated to the Applicant. Subsequently, the Applicant modified his contention by asserting that it was not the Secretary General who had so indicated but his secretary, in a telephone conversation. In that conversation, which occurred some time after the Applicant and the Secretary General had met on 21 August 1991, the Secretary General's secretary is alleged to have made, at his direction, the statement originally ascribed by the Applicant to the Secretary General. By letters dated 13 August 1993 and 14 September 1993 to the Applicant, the Secretary General informed him that neither he nor his secretary recalled having made such a statement. The Tribunal is unable to conclude from the foregoing that the Applicant understood that action on his request for review was being deferred.

VIII. The Applicant's second argument is that the refusal of the Secretary General to waive the time limit was arbitrary and unjust in that he did not submit comments or advance any argument against the waiver before the AJAB. This contention is without merit. Indeed, the Chairman of the AJAB informed the Applicant that "No comments are sought or provided for preliminary matters such as a recommendation on the waiver of time limits." It is therefore not surprising that the Secretary General submitted none. It is for him to decide what, if any, submission he wishes to make to an Advisory Joint Appeals Board. Although it might perhaps have been desirable for the Secretary General, before receiving the recommendation of

the AJAB, to have provided the AJAB with the reasons for his unwillingness to waive the time bar, the Tribunal does not consider this as tantamount to an arbitrary refusal to waive the time bar. The Secretary General was, of course, aware that it was within his discretion to accept or reject the recommendations of the AJAB. In the view of the Tribunal, the test of arbitrariness relates to the reasons for unwillingness to waive a time-bar far more than to when they are given. The Secretary General subsequently notified the AJAB that he saw no exceptional circumstances warranting waiver of the time bar.

IX. The Applicant also claims that, as late as 8 December 1993, the Secretary General in the presence of another official of the Organization, confirmed, contrary to earlier denials, that he had directly and/or indirectly communicated to the Applicant that the Applicant's 21 May 1991 request for review would be considered after the issue relating to his nationality had been resolved. In response to a request for information by the Tribunal concerning this allegation, the Secretary General, by a letter dated 31 May 1995, reiterated his previous denials. In addition, the Applicant's counsel, who was present at the 8 December 1993 meeting, has acknowledged the correctness of the statement by the Secretary General in response to the Tribunal's information request.

Finally, the Applicant makes the point that he was not apprised of available recourse in accordance with the last sentence of staff rule 111.1.2, which provides:

> "When informing a staff member following either review or appeal action, the Secretary General shall, where appropriate, advise the staff member as to possible further recourse actions."

The Tribunal does not consider the quoted language to be of material relevance since the rule leaves it to the Secretary General to determine whether such advice is appropriate. The Tribunal notes that the time-bar here did not result from an untimely appeal of a

response to a request for review or appeal. It resulted from an untimely appeal following absence of a reply by the Secretary General within the proscribed period to a request for review. Hence, there was no occasion for the Secretary General to determine whether it was appropriate to advise the staff member as provided in the quoted sentence.

X. In view of the foregoing and the absence of any showing of errors of fact or law, partiality, arbitrariness or discrimination, the Tribunal considers that the Respondent's decision was within his discretionary authority. In this regard, the Tribunal notes that the Secretary General explained to the Chairman of the AJAB his rejection of the recommended waiver on the ground that the challenged decision regarding appointment to the post sought by the Applicant had been taken by his predecessor, based on the latter's and the APB's evaluation of the candidates, and that the Applicant was so informed. The successor Secretary General stated that he did not recognize any exceptional circumstances in the case.

XI. For the foregoing reasons, the application is rejected.

(Signatures)

Jerome ACKERMAN
President

Mikuin Leliel BALANDA
Member

Mayer GABAY
Member

Geneva, 21 July 1995

R. Maria VICIEN-MILBURN
Executive Secretary